

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CAROL WESTFALL)	
Claimant)	
VS.)	
)	Docket No. 202,398
KELLY SERVICES)	
Respondent)	
AND)	
)	
CNA INSURANCE COMPANIES)	
Insurance Carrier)	

ORDER

Respondent appeals from an Award entered by Administrative Law Judge Robert H. Foerschler on July 14, 1998. The Appeals Board heard oral argument January 19, 1999, in Kansas City, Kansas. Although claimant did not file a separate application for review, claimant has raised issues in her brief in addition to those raised by respondent.

APPEARANCES

C. David Whipple of Kansas City, Missouri, and William W. Hutton II, of Kansas City, Kansas, appeared on behalf of claimant. Eric T. Lanham of Kansas City, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board has considered the record listed in the Award. In addition, the Board has reviewed and considered the depositions of Donna Robinson and Mary Lou Rivas. These depositions were not listed in the Award and apparently were not part of the record considered by the ALJ. Both parties agreed, however, that these depositions were intended to be part of the record and agreed they should be considered by the Board. Apparently both thought the depositions had been submitted to the ALJ as part of the record.

The Board has also adopted the stipulations listed in the Award.

ISSUES

The ALJ awarded benefits based on a 6 percent permanent partial general body disability. On appeal, respondent contends benefits should have been denied because claimant failed to give notice as required by K.S.A. 44-520 and has not shown just cause for failing to give notice.

Claimant, on the other hand, contends the Award should be based on a 19 percent permanent partial general disability and argues that the Award should be modified to grant claimant future medical expenses.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the evidence, the Appeals Board finds and concludes the Award should be modified to an Award for 10 percent permanent partial disability.

Findings of Fact

1. Claimant was employed by Kelly Services, Inc., beginning in 1994 and was assigned to work as a temporary employee for Continental Insurance in November 1994.
2. On March 21, 1995, claimant's back went out while she was carrying a box of paper to be used in a fax machine. Claimant testified something popped, she could not move, and she dropped the box of paper. A coworker heard the box fall, but claimant did not, at that time, notify any supervisory personnel. Although her back hurt, claimant continued to work. She testified she thought it might be just a strain.
3. For the next month, claimant used a heating pad and did stretches in the evening, but her condition did not improve. On the morning of Friday, April 21, 1995, claimant could not get out of bed. She testified she was paralyzed and had to remain on her back. Her husband called work and let them know she would not be in. She went to a chiropractor that Saturday but remained in essentially the same condition for three days.
4. On Monday, April 24, the pain subsided and claimant returned to work. Coworkers suggested she tell a supervisor about the problem, and claimant did notify Mary Lou Rivas. Ms. Rivas told claimant that Jennifer Golden had mentioned the incident to her. According to claimant, Ms. Golden, a permanent employee claimant was assisting at the time of the accident, was advised of the incident shortly after it happened. Ms. Rivas advised claimant to notify Kelly Services. Claimant did notify respondent Kelly Services the next day, April 25.
5. Donna Robinson, administrative manager and district trainer for respondent Kelly Temporary Services, testified she was employed in the Kansas City, Kansas, branch in the summer of 1994 when claimant was hired in the Overland Park branch. Ms. Robinson stated she was familiar with the procedures for training new employees. She identified an

Employee Handbook that, according to Ms. Robinson, was provided to all new employees. The Handbook contained instructions about reporting an accident. Under the heading "Safety reminders" the document stated:

If you are injured on an assignment, call us. If your injury requires emergency treatment, follow the customer's instructions for medical treatment. **NOTE:** Advise any medical care facility that you are an employee of Kelly Temporary Services because you are covered by *our* workers' compensation, not the customers.

6. Ms. Robinson also testified that the required notice of workers compensation information was posted in the room where employees are interviewed when first hired. She did not know whether claimant had been there since she was hired.

7. Mary Lou Rivas, claimant's supervisor at Continental where the accident occurred, testified the workers compensation information notice was posted in the cafeteria on the fifth floor. Claimant worked on the fourth floor and she could not say whether claimant had been on the fifth floor.

8. Claimant testified that at the time she was hired she received a packet explaining policies on vacation, holidays, bonuses, employee of the month awards, and other similar matters. Claimant introduced that material into evidence and the packet claimant introduced did not have information about giving notice of an injury. Claimant also testified she was never advised what to do if she had an accident.

9. After receiving notice of the accident on April 25, 1995, respondent referred claimant to Dr. Brown. Although claimant did not recall the exact date of accident, she told Dr. Brown it had been about one month earlier. Dr. Brown prescribed physical therapy and continued to treat claimant through May 18, 1995.

10. After the May 18, 1995, visit with Dr. Brown, respondent's insurance carrier advised it would not authorize further treatment. Claimant retained counsel and her counsel referred her to Dr. Dennison R. Hamilton.

11. Dr. Hamilton first saw claimant June 2, 1995. He diagnosed lumbar sprain with symptoms of radiculitis. In August 1996, an MRI was done and it revealed disc herniation at L5-S1. He recommended epidural injections and on the last visit he suggested claimant see a low back surgeon. Dr. Hamilton rated claimant's impairment as 19 percent of the whole body. Claimant did not go to see a surgeon as suggested.

12. At the request of claimant's counsel, claimant was also examined and evaluated by Dr. Daniel D. Zimmerman. He rated the impairment as 7 percent of the whole body and recommended restrictions. He stated she is capable of lifting 50 pounds on an occasional basis and 25 pounds on a frequent basis. He also indicated she should avoid frequent

flexing of the lumbosacral spine and should avoid frequent bending, stooping, squatting, crawling, and kneeling.

13. Claimant was also examined and her injury evaluated by Dr. Michael J. Poppa. He diagnosed a resolved lumbar strain superimposed on preexisting degenerative disc disease with associated disk bulging and rheumatoid arthritis. He rated the impairment as 5 percent of the whole body with 50 percent of that 5 percent preexisting due to chronic rheumatoid arthritis of the lumbar spine. He concluded she is capable of full employment without restrictions and stated she requires no additional formal medical treatment.

Conclusions of Law

1. The Board concludes claimant did not satisfy the 10-day notice requirements of K.S.A. 44-520. The statute requires injured employees to notify their employer within 10 days of an accident. The time limit is extended to 75 days if the employee has just cause for not giving notice within the 10 days. In this case, claimant clearly did not give notice within 10 days, but the Board concludes she has shown just cause for failing to do so.

Although claimant testified to a single event, not a gradually occurring injury, she also testified she thought it might be a strain and continued to work. Once it became apparent the condition was more serious and needed medical attention, she gave notice. Respondent apparently does generally advise employees of the need to give notice, but claimant states she was not so advised, and the Board finds her testimony to be credible on this point. The contrary evidence is only of general policy and practice.

2. The Board finds claimant has a 10 percent permanent partial general body impairment as a result of the injury. This conclusion is reached by giving approximately equal weight to the impairment ratings by the three physicians. Only Dr. Poppa's report provides any evidence of preexisting impairment. The Board finds the evidence of the preexisting impairment, if any, unconvincing and has not, for that reason, subtracted preexisting impairment.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Robert H. Foerschler on July 14, 1998, should be, and the same is hereby, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Carol Westfall, and against the respondent, Kelly Services, and its insurance carrier, CNA Insurance Companies, for an accidental injury which occurred March 21, 1995, and based upon an average weekly wage of \$216, for 4 weeks of temporary total disability compensation at

the rate of \$144.01 per week, or \$576.04, followed by 41.5 weeks at the rate of \$144.01 per week, or \$5,976.42, for a 10% permanent partial disability, making a total award of \$6,552.46, all of which is presently due and owing less amounts previously paid.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of February 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: C. David Whipple, Kansas City, MO
William W. Hutton II, Kansas City, KS
Eric T. Lanham, Kansas City, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director